No. 353

In the Supreme Court of the United States

October Term, 1960

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

ELVIS L. BROOKS, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS—FORT SMITH DIVISION

JURISDICTIONAL STATEMENT

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FEBRUARY, 1961.

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OPINIONS BELOW

The opinion of the United States District Court for the Western District of Arkansas is reported at 188 F. Supp. 160 and is set forth in Appendix A to this Statement. The report of the Interstate Commerce Commission is printed at 81 M.C.C. 35 and is set forth as Appendix C to this Statement.

JURISDICTION

This suit was brought under 28 U.S.C. 1336, 1398, 2284, and 2321 to 2325, inclusive, to set aside orders of the Interstate Commerce Commission. The judgment of the District Court, attached to this State-

ment as Appendix B, was entered on October 19, 1960, and notice of appeal was filed in that court by the Commission on December 16, 1960.

The jurisdiction of this Court to review the judgment of the District Court on direct appeal is conferred by 28 U.S.C. 1253 and 2101(b), and is sustained by the following decisions: *American Trucking Associations, Inc. et al.* v. *Frisco Transportation Company*, 358 U.S. 133, and *American Trucking Associations, Inc. et al.* v. *United States et al.*, 364 U.S. 1.

STATUTES INVOLVED

The provisions of sections 203(a)(15) and 209(b) of the Interstate Commerce Act, as amended, 49 U.S.C. 303(a)(15) and 309(b), are set forth in Appendix D.

QUESTIONS PRESENTED

1. Whether the District Court erred in holding that the enumeration in the 1957 amendments to Section 209(b) of the Interstate Commerce Act of five factors which the Commission is to consider in determining whether the grant of a motor contract carrier permit would be consistent with the public interest and the national transportation policy, is exclusive so as to preclude the Commission from considering the adequacy of existing common carrier service in relation to two of those factors, i.e., the effect of a denial upon a shipper and the effect of a grant upon the services of protesting carriers.

2. Whether the District Court erred as a matter of law by itself finding that the supporting shippers

needed a specialized transportation service and that the services of existing carriers were inadequate to meet the shippers needs.

3. Whether the District Court erred in holding that Section 209(b) requires the Commission to consider the proposed lower rates of an applicant for a contract carrier permit in its evaluation of the effect of a denial of the permit upon the supporting shippers.

STATEMENT

This case involves an application for contract carrier authority to transport canned goods for three shippers,[1] from Springdale, Lowell, and Fort Smith, Arkansas, and Westville, Oklahoma, to numerous points in 33 States, and of materials and supplies used in the manufacture of canned goods from 30 of these States to the 4 named points in Arkansas and Oklahoma. Prior to the grant of temporary authority because of a strike of Steele's drivers in 1958, 80 percent of its traffic had been transported by Steele in private carrier operations. In addition to manufacturing and selling its own canned goods, Steele purchases and distributes about 75 percent of Cain's and Keystone's annual production, taking title at the suppliers' plants and arranging delivery. Steele supported the applicati because it desired a single-line service to all points. Although existing service of common carriers had been almost completely untried in recent years, Steele asserted that on less-than-truckload shipments existing common carriers are

[1] Steele Canning Co., Cain Canning Co., Inc., and Keystone Packing Co.

unable to provide expeditious stopping in transit service for multiple pickups and deliveries, and that existing less-than-truckload rates are prohibitive. Cain and Keystone, although selling most of their annual production to Steele, supported the application upon a desire to establish a sales area by shipping their traffic in less-than-truckload lots to prospective customers at lower contract carrier rates. While there were no complaints about defects in existing inbound common carrier service, inbound authority was supported merely to enable Reddish to conduct a balanced operation.

A number of motor carrier protestants presented evidence of their authorities and operations. By either direct or joint-line service, they can provide service to substantially all points involved in the application. Each of the opposing motor common carriers operates a substantial amount of equipment suitable for the transportation of canned goods and renders a daily service to other manufacturers of the same or similar commodities. Although Steele, Cain and Keystone have knowledge of the availability of service from the protesting motor carriers, who are willing to provide multiple pickups and deliveries en route, none of the protestants has participated in the involved traffic.

The railroad protestants operate extensively throughout the territory sought to be served by Reddish. Canned goods constitute a substantial part of their traffic, and they have been experiencing a sharp decline in canned goods tonnage. They have partici-

pated in outbound movements of the supporting shippers' traffic, but to a greater extent have handled inbound movements of materials and supplies. They contended that they are able to provide needed service and that the shippers have failed to take full advantage of their facilities and services.

The hearing examiner recommended a grant of the application finding that the service proposed would be consistent with the public interest and the national transportation policy.

Upon exceptions to the examiner's recommended report and order, and replies thereto, the Commission's Division 1 issued its report and order (81 M.C.C. 35, being Appendix C, *infra,* pp. 18a–30a) disapproving the examiner's recommendation and denying the application for the stated reason that "applicant has failed to establish that the proposed operation will be consistent with the public interest and the national transportation policy." (81 M.C.C. at 43, app. C, *infra,* p. 30a). The Commission made numerous subsidiary findings supporting its conclusion. (81 M.C.C. at 40–42, app. C, *infra,* pp. 26a–30a.)

Appellee Reddish timely filed a petition for reconsideration and oral argument to which the protesting rail and motor carriers replied. In addition the Contract Carrier Conference and the Regular Common Carrier Conference of the American Trucking Associations, Inc., each filed petitions for leave to intervene. The Contract Carrier Conference also sought reconsideration. By order dated December 16, 1959, the full Commission granted both petitions for leave

to intervene and denied the petitions for reconsideration.

Appellee Reddish then instituted an action in the District Court to set aside the report and orders of the Commission. By orders of the District Court the Contract Carrier Conference of the American Trucking Associations, Inc., was permitted to intervene as a plaintiff. The District Court also permitted 7 of the motor carrier protestants, 32 rail carrier protestants in Western Trunk Line Territory and the Regular Common Carrier Conference of the American Trucking Associations, Inc., to intervene as defendants.[2]

On October 19, 1960, the District Court rendered its opinion (Appendix A, *infra*, pp. 1a–15a), and judgment (Appendix B, *infra*, pp. 16a–17a), setting aside the Commission's orders and enjoining their enforcement and remanding the cause to the Commission for such further proceedings in conformity with its opinion as may be proper. This appeal followed.

THE QUESTIONS ARE SUBSTANTIAL

Although this is a companion case to *Interstate Commerce Commission* v. *J-T Transport, Inc., et al.*, No. 563, October Term 1960, now pending before this Court on direct appeal, distinct and crucial questions are presented here which are not before this Court

[2] The Department of Justice, representing the United States of America, confessed error in its Answer and actively argued for reversal of the Commission's order on the grounds that the Commission failed to consider the question of the applicant's proposed lower rates and that the order was not supported by substantial evidence.

in the *J-T* case.[2] It presents the broad and important question of whether Congress, in the 1957 amendments to the motor contract carrier provisions of the Interstate Commerce Act, has required the Commission to issue a contract carrier permit whenever a shipper expresses a desire for contract carrier service because of lower rates, without regard to the fact that existing motor common carriers hold appropriate authority and are able and willing to furnish adequate service. The resolution of this issue will determine whether a significant volume of traffic which could be efficiently and adequately handled by existing common carriers is to be automatically allocated to motor contract carriage simply because the shippers desire lower rates and threaten to resort to private carriage if a permit is not granted.

The 1957 amendments to Sections 203(a)(15) and 209(b) of the Act were the aftermath of this Court's decision in *United States* v. *Contract Steel Carriers*, 350 U.S. 409, 412 (1956), that "a contract carrier is free to aggressively search for new business within the limits of its license." As noted by the House Committee on Interstate and Foreign Commerce (H.R. Rep. 970, 85th Cong., 1st Sess. (1957) p. 3), "Freedom to solicit customers without restriction as to specialized service obliterates the distinction which Congress intended to make between common and contract carriers, and opens the door to unjust discrimination among shippers." Accordingly, Congress re-

[2] The Court may desire to consolidate these two cases for joint disposition because of the inter-relation of legal issues involved.

defined the term "contract carrier by motor vehicle" in Section 203(a)(15) as "any person which engages in transportation by motor vehicle * * * under a continuing contract with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer." At the same time, Section 209(b) was amended to empower the Commission to limit the number of persons which can be served by a contract carrier.

Prior to the 1957 amendments, Section 209(b) authorized motor contract carrier operations found to be "consistent with the public interest and the national transportation policy." The 1957 amendments added the following language:

> In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements.

This case arises out of the quoted amendment, and its legislative history.

The Commission denied Reddish's application, concluding (App. C, *infra*, pp. 27a–29a, 81 MCC at

41–42) (1) that "Shippers require a motor-carrier service for the transportation of less-than-truckload shipments of canned goods, providing multiple pickups and deliveries," (2) that the "protesting carriers are authorized to serve the origin points involved and * * * numerous points in the vast 33-State destination territory * * *," and "they are willing to make multiple pickups and they offer stopoff-in-transit delivery service," (3) that "the service required by the shippers [is in no] way different from that which motor common carriers are rendering daily to countless other shippers of the same or similar commodities * * * and * * * could be performed by protesting common carriers as well as by applicant," (4) "that authorization of a new carrier to transport traffic which a common-carrier protestant can efficiently handle would have an adverse effect upon the service of that protestant," (5) "In the absence of a more positive showing that existing service will not meet shipper's reasonable transportation needs, we are not warranted in finding that a new service should be authorized or that the supporting shippers will be adversely affected by a denial of this application."

In so holding, the Commission stated "There has been no convincing showing by applicant that the supporting shippers have a real need for the proposed contract-carrier service. On the contrary, the only serious complaint which shippers have against existing service is with the less-than-truckload rates of motor common carriers. * * * their support of this application rests entirely upon a desire to obtain

lower rates" which "* * * is not a sufficient basis to justify a grant of authority to a new carrier." (App. C, *infra*, pp. 29a–30a.)

1. The court below clearly erred in holding that the five specified criteria listed in Section 209(b) are the exclusive factors which the Commission must consider in determining contract carrier applications and preclude the Commission's consideration of the adequacy of existing common carriers' service in evaluating the effect which granting the permit would have upon the services of protestant common carriers, and the effect which denying the permit would have upon the supporting shippers.

The court below, in interpreting the 1957 amendments, referred to the *J–T Transport* case[4] as "* * * one of first impression in construing the new status of an applicant for a permit as contract carrier when opposed by common carriers on the ground that adequate service was already available by common carrier," and which "set aside the order of the Commission for wrongfully applying the new criteria prescribed by the * * * amendments." Clearly, the court below was of the same view as the court in *J-T* that the 1957 amendments, which had originated in the Congressional belief that this Court's *Contract Steel Carriers* decision gave too broad a scope to motor contract carriage, have in yet another way greatly enhanced the role of contract carriage at the expense of common carrier transportation. Not a word in the legislative history of the 1957 amendments reflects any

[4] *J–T Transport, Co., Inc.* v. *United States*, 185 F. Supp 838.

Congressional understanding that this was their purpose.[5]

The decision finds such a deliberate and drastic change in the national transportation policy by the following deduction, which we believe to be erroneous. The Commission had proposed an amendment to Section 209(b) that a contract carrier permit could be issued only upon an affirmative showing by the applicant "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown." As was noted by the court below, during the 1957 hearings before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 85th Cong., 1st. Sess., entitled *Surface Transportation—Scope of Authority of I.C.C.* (p. 22) the Commission proposed deletion of its own proposal "because of the very difficult burden of proof that would be imposed on applicants." We submit that sparing contract carrier applicants the burden of proving that existing common carriers are unwilling or unable to provide a needed service, does not reflect a Congressional purpose that contract carrier permits shall be issued without regard to affirmative evidence of the adequacy of existing common carrier service

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[5] In recommending passage of the amendments (S. 1384), the Senate Committee on Interstate and Foreign Commerce concluded (Senate Rept. No. 703, 85th Cong., 1st Sess., July 24, 1957, p. 7):

"Your Committee is of the opinion that *the public interest in a sound transportation system, and particularly in a stable and adequate system of common carriage*, in the light of the national transportation policy, require that the bill, as amended be passed." [Emphasis supplied.]

and the willingness and ability of existing common carriers to provide the service required by the supporting shippers which is introduced in the record by the protesting carriers. Nothing in the legislative history of the amendments suggests that Congress even contemplated such a drastic change in the relative roles of motor contract and motor common carriage.*

We submit that the adequacy of existing motor carriers' service is obviously pertinent in determining the effect of a denial upon the shipper—one of the factors which the Commission admittedly must consider. The national transportation policy, which is the yardstick by which the correctness of the Commission's action will be measured, *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83, 88, could

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*To the contrary, the General Counsel for the Contract Carrier Conference of American Trucking Associations, Inc., the author of the enumerated factors which were inserted in Section 209(b) told the Senate Subcommittee (Senate Hearings, *supra*, pp. 299–300) "* * * The suggestion that we have made, both before this Committee and before the Commission would limit contract carriers rather than provide for any expansion, * * *. We do not suggest any change in that standard (a permit shall be granted if it is shown that the service proposed is consistent with the public interest and the national transportation policy). The only thing we have suggested in that connection is that there are certain findings that we feel the Commission should make whenever they are considering the question of the interest of the public, * * * the primary thing that we have always felt the Commission should do in those cases is consider not only the effect of granting this authority on the common carrier—they do that in each and every case—but to consider the effect denial will have on the contract carriers; the public interest is something to be balanced, and we think that both these matters should be taken into consideration * * *."

not be carried out if the Commission were required to close its eyes to any matter which might affect the good of the national transportation system as a whole and grant contract carrier permits merely because certain shippers desire to obtain transportation at lower rates.

2. The District Court's opinion (App. A, *infra*, p. 14a) rejects the Commission's finding that the service of existing common carriers is adequate to meet the reasonable transportation needs of the shippers, and substitutes its view that the shippers require a special service and the lower rates of such a service, which, in the court's view, cannot be supplied by existing common carriers. Clearly, the court below was of the view that the Commission, in weighing the conflicting evidence, may no longer reject general assertions of inadequacy of existing service, but must grant a contract carrier permit regardless of positive evidence by protestants of adequacy of service, merely because shippers desire lower rates or threaten to resort to private carriage.

By Section 209(b), Congress has empowered the Commission to determine "the nature of the proposed service." We submit that this clear usurpation of the Commission's proper function of weighing the evidence is beyond the powers of a reviewing court. *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 535–536; *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 488; *Gray* v. *Powell*, 314 U.S. 402. Proper administration of the Act requires that the Commission, not the reviewing court, make this

critical and difficult determination of whether there has been proposed a specialized service designed to meet special needs of the supporting shippers.

3. The court below erred when it rejected the Commission's conclusion that a shipper's desire to obtain lower rates for a service which is being adequately rendered by existing carriers is not a sufficient basis to justify a grant of new authority.[1] Without citation of judicial precedent or statutory authority,[2] the court below holds that the 1957 amendments overturn this long-established principle. Under the lower court's concept, since Reddish's lower rates result from "economies and advantages inherent in contract carrier operations", the national transportation policy's goal to promote "economical service" requires the Commission to consider such lower rates in its evaluation, under Section 209(b), of the effect of a denial of a permit upon the supporting shippers. This was error. There is not a scintilla of evidence in the record which would even remotely establish

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[1] The Commission has consistently held that the level of rates is not a proper matter for consideration in application proceedings for motor common and contract carrier authority, as well as in proceedings for unification of motor carriers. See, e.g., *Wellspeak Common Carrier Application*, 1 M.C.C. 712, 715–716 (1937); *Ingham Brokerage Inc., Ext.-Automotive Parts*, 12 M.C.C. 607, 610–611 (1939); *Rock Island M. Transit Co.—Purchase—White Line M. Frt. Inc.*, 5 M.C.C. 451, 457 (1938); Cf., *Railway Express Agency* v. *United States*, 153 F. Supp. 730, 741, affirmed, 355 U.S. 270; *Atlanta-New Orleans Mtr. Frt. Co.* v. *United States*, 10 F.C.C. par. 30,886 (U.S.D.C. N.D.-Ga. 1953).

[2] The question of rates was not even mentioned in the 1957 amendments or its legislative history and obviously was given no consideration by Congress.

that the proposed lower rates would be made feasible through more efficient and economical operation by Reddish.

4. We submit that whether Congress intended to make a significant change in the relative roles of motor common and contract carriage, or to convert contract carrier application proceedings into rate proceedings with the emphasis placed on the alleged lower rates of a contract carrier applicant, should be determined by this Court.

The practical importance of this case arises from the fact that a substantial diversion of traffic to contract carriage could, as the Chairman of the Commission testified before the Senate Subcommittee in 1957 (Hearings, *supra*, p. 22) "seriously impair (the ability of common carriers) to render adequate service to the general public, particularly to the small shippers who depend almost entirely upon common carrier transportation, and seldom have enough business to justify entering into a contract with a contract carrier."

Since the 1957 amendments, the Commission has decided 16 contract carrier applications inconsistently with the holdings of the lower courts in this case and in *Interstate Commerce Commission* v. *J–T Transport Co., Inc., et al.*, No. 563, October Term 1960, now pending before this Court on appeal. It has pending before it at least 40 cases involving the same issues. To the questions presented in the *J–T Transport Co.* case, this case adds the issue of the extent to which the Commission must give decisive weight to the lower rates proposed by an applicant for a contract carrier permit. In *J–T Transport Co.*, the protesting

common carrier was engaged in performing the same highly specialized transportation service with special equipment as was proposed by the applicant. Here, the applicant seeks to perform a commonplace service in the transportation of canned goods in standard equipment, such as many motor carriers perform. Taken together, the two cases present effectively the issues which have arisen as to the proper interpretation of the 1957 amendments.

CONCLUSION

For the reasons stated, we believe that the questions presented by this appeal are substantial and are of such importance as to require plenary consideration, with briefs and oral argument for their resolution.

Respectfully submitted.

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF ARKANSAS, FORT SMITH DIVISION

Civil Action No. 1531

ELVIN L. REDDISH, PLAINTIFF

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

CONTRACT CARRIER CONFERENCE OF AMERICAN TRUCKING ASSOCIATIONS, INC., INTERVENING PLAINTIFF

L. A. TUCKER TRUCK LINES, INC., ORSCHELN BROS. TRUCK LINES, INC., ARKANSAS-BEST FREIGHT SYSTEM, INC., EAST TEXAS MOTOR FREIGHT LINES, INC., GILLETTE MOTOR TRANSPORT, INC., WESTERN TRUCK LINES, LTD., REGULAR COMMON CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC., ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, AND 31 OTHER CLASS I RAIL CARRIERS IN WESTERN TRUCK LINE TERRITORY, INTERVENING DEFENDANTS

BEFORE MATTHES, Circuit Judge, and MILLER and YOUNG, District Judges.

YOUNG, J.

This is an action before a three-judge district court to enjoin and set aside orders of the Interstate Commerce Commission which denied plaintiff, Elvin L. Reddish, permanent authority to operate as a contract carrier by motor vehicle in interstate commerce. 28 U.S.C. §§ 1336, 1398, 2284 and 2321 through 2325 inclusive. By statute, the action is against the United States, represented by the Attorney General, while the

Interstate Commerce Commission is made a party by right. 28 U.S.C. § 2323 (1958).

The Contract Carrier Conference of the American Trucking Associations, Inc., intervened before the Commission, and in this action on behalf of the plaintiff. The Commission is supported, in turn, by six common motor carriers, 32 railroads, and the Regular Common Carrier Conference of the American Trucking Associations, Inc., all of whom intervened before the Commission and in this action in opposition to the authority sought by plaintiff.

In its answer, the United States admitted all of the allegations of the complaint.[1] The United States filed a brief in this Court in support of its position that the orders of the Commission should be set aside and the cause remanded for further proceedings. Counsel for the Government also appeared at the hearing and presented oral argument. In summary, the Government's position is that the Court (sic. Commission) erred (1) in concluding that grant of the application would adversely affect the protesting carriers; (2) in concluding that denial of the application would not adversely affect the supporting shippers.[2]

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[1] Paragraph 12 of the complaint alleged: "The Orders of the Interstate Commerce Commission dated June 30, 1959 and December 16, 1959 are erroneous and void as a matter of law for the reason that they are arbitrary and capricious and without foundation in substantial evidence in the record considered as a whole."

[2] Encompassed in the second point is the contention that the Commission erred in treating as irrelevant the injury to supporting shippers caused by the higher cost of common carrier service; erred in concluding that the supporting shippers would not be adversely affected by withholding from them a contract-carrier service meeting transportation needs which the existing common carriers do not adequately meet.

The Interstate Commerce Commission, in its answer, denied that its action in denying plaintiff the permit he requested was unlawful, and stated that the action it had taken was fully supported and justified by the record.

The trial examiner of the Commission found that the service proposed by plaintiff would be consistent with the public interest and the national transportation policy, and recommended that the authority requested be granted. Division 1 of the Commission, however, denied the authorization requested, although the trial examiner's findings of fact were adopted by the Commission as their own. The action of Division 1 was sustained by the full Commission, which held:

> (a) that the findings of Division 1 are in accordance with evidence and the applicable law, and (b) that no sufficient cause appears, for reopening the proceeding for reconsideration or for oral argument.

This action was brought by plaintiff for judicial review of this denial by the Commission.

There is no material dispute as to the facts. They are as follows:

Plaintiff requests permanent authority to operate as a contract carrier for Steele Canning Company and Cain Canning Company of Springdale, Arkansas, and for Keystone Packing Company of Fort Smith, Arkansas. He proposes to handle pool-truck shipments of less-than-truckload orders intended for delivery in 33 states, and to handle certain canning supplies on his return trips from 30 of these states. Steele Canning Company is the major shipper of the three that plaintiff proposes to serve. Steele normally purchases about 75% of the production of Cain and Keystone, which Steele in turn resells to the wholesale and retail market. Steele began transporting its own small

order loads in 1948. This operation increased as Steele's small order business increased, until the fleet of trucks operated by Steele numbered 29 in January of 1958. Throughout this period Steele handled most of its truckload shipments by common carrier, principally Jones Truck Line, Inc., of Springdale, Arkansas, who supports the plaintiff's application to handle the less-than-truckload orders.

Steele's less-than-truckload orders account for approximately 80% of its business, which it transported almost exclusively by its own private carriage until June of 1958, when a labor dispute interfered with such operations. Steele at that time prompted plaintiff to apply for authority to handle this operation as a contract carrier. In June 1958 the Commission granted plaintiff temporary operating authority substantially as requested by him. The service rendered by plaintiff under such authority was found by the trial examiner to be substantially similar to the private carrier operations previously performed by Steele. The contract service rendered by plaintiff to Cain and to Keystone largely involves their sales to Steele, but both are interested in developing their own less-than-truckload business, which plaintiff would handle.

The three canners insist that the only satisfactory alternative to private carriage is contract carriage of the type plaintiff proposes to offer and which he has performed for them under temporary operating authority. Their business is intensely competitive and has a small margin of profit. Most small order accounts operate on small inventories, making it critical that their orders be filled promptly. Further, Steele has found that many of its customers have special unloading times and requirements which must be observed at risk of the loss of that business. Because of these facts and because of the scattered location of the small

order customers throughout the 33 states named in plaintiff's application, these three canners insist that they would not be in a competitive position if forced to rely upon common carriers for delivery of less-than-truckload orders. Delays in "interlining" shipments, coupled with what the canners regard as "prohibitive" common carrier less-than-truckload rates, would, they say, place them at a disadvantage as to their competitors, who maintain their own fleets of trucks. The canners intend to abandon their private carriage operations and, in effect, use plaintiff as though he were their shipping department.

While the trial examiner found that some less-than-truckload shipments which require delivery stops for a portion of the freight at one or two points enroute to final destination had been satisfactorily handled by common carrier, the traffic that the three canning companies propose giving plaintiff involves from three to ten stops, with six stops being approximately the average less-than-truckload pooled shipment. This business has not in the past been handled by the protestant common carriers and, say the three shippers, will continue to be handled by private carriage if plaintiff's application is not granted, though the protestant common carriers insist that their experience indicates that they will receive some of this traffic if it is not handled by a contract carrier.

I

The limits of permissible judicial review of the order of the Interstate Commerce Commission here in question are determined by Section 10(e) of the Administrative Procedure Act. 60 Stat. 243 (1946), 5 U.S.C. § 1009(e) (1958). The appeal is upon the record made before the Commission and its order must be sustained if it is supported by substantial evidence

when viewed on the record as a whole and if the action taken is within the scope of its lawful authority. *Universal Camera Corporation* v. *Labor Board*, 340 U.S. 474, 490 (1951). Plaintiff alleges that the order under review lacks substantive support for several findings and conclusions expressed by Division 1 in its report, and further alleges that the report applies a test not permitted by statute.

Our review of the record has convinced us that the plaintiff is correct in these contentions.

II

In declaring the national transportation policy, Congress included the following goals:

> * * * to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices * * *. 54 Stat. 899 (1940), 49 U.S.C., preceding § 1 (1958).

We need not decide whether contract motor carriers are a separate "mode" of transportation from common motor carriers to hold, as we do, that the goal of the national transportation policy encompasses all modes and all carriers subject to regulation.

A contract carrier by motor vehicle is defined by statute as:

> * * * any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation * * * [other than common carriers], under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continu-

> ing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer. 71 Stat. 411 (1957), as amended, 49 U.S.C. § 303 (a)(15) (1958).

The Commission found that plaintiff would fit this definition, but upon its review of the entire case concluded:

> It is clear that authorization of a new carrier to transport traffic which common carrier protestant can efficiently handle would have an adverse effect upon the service of that protestant. See *J–T Transport, supra.*
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> * * * * *
>
> There has been no convincing showing by applicant that the supporting shippers have a real need for the proposed contract carrier service. On the contrary, the only serious complaint which shippers have against existing service is with the less-than-truckload rates of motor common carriers. Even should the application be granted, they assert, they will continue to use common carrier service to some extent. It may be fairly concluded, we believe, that their support of this application rests entirely upon a desire to obtain lower rates. This is not a sufficient basis to justify a grant of authority to a new carrier. If the shippers believe that the rates of presently authorized carriers are unjust or unreasonable, they should seek relief in actions against these carriers under appropriate provisions of the act. Under the circumstances, the application will be denied.

The applicable section of the Interstate Commerce Act provides:

> Subject to * * * [the provision against holding both a common carrier certificate and a contract carrier permit], a permit shall be issued to any qualified applicant therefor au-

thorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this chapter and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit, will be consistent with the public interest and the national transportation policy declared in the Interstate Commerce Act; otherwise such application shall be denied. In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in the Interstate Commerce Act, the Commission shall consider [1] the number of shippers to be served by the applicant, [2] the nature of the service proposed, [3] the effect which granting the permit would have upon the services of the protesting carriers, [4] the effect which denying the permit would have upon the applicant and/or its shipper and [5] the changing character of that shipper's requirements. 71 Stat. 411 (1957), 49 U.S.C. § 309(b) (1958).

There is no contention that plaintiff has not demonstrated his fitness and ability to meet the first two requirements for the issuance of a permit, and as is said in the Commission's opinion, the fifth matter for consideration is not involved. As shown above, the Commission found that the granting of the permit would have an adverse effect upon the protesting common carriers because such carriers could efficiently handle the business, and there was no adequate showing that the supporting shippers had a real need for the proposed service. Thus, the third and fourth criteria enumerated in the act are the only ones involved, and it is upon these conclusions that the Commission denied plaintiff a permit as not being

consistent with the public interest and the national transportation policy.

The statutory enumeration of factors for Commission consideration in determining consistency with the public interest and national transportation policy specifically includes the effect that a denial of the permit would have upon the supporting shippers, but as interpreted by the Commission—

> * * * whether the shippers would be adversely affected by a denial must depend upon a determination of whether existing service is adequate to meet their transportation requirements.

We find no authority for limiting the inquiry as to the effect of a denial of a permit to a mere inquiry as to the adequacy of presently available service. Indeed, as applied by the Commission in this case, there is no distinction between this test and the test of proving public convenience and necessity that must be met by applicants for a common carrier certificate.

Considering all of the record, including the evidence of the lower cost of plaintiff's proposed service, it is clear that substantive evidence does not support the Commission's finding that the supporting shippers will not be adversely affected by a denial of this application; the record, the findings of the examiner, and the specific findings of fact stated by Division 1 in its report all indicate the contrary—the alternative faced by the shippers if the application is denied is the operation of their own trucks, in substantial numbers, in private carriage; common carriers are not an adequate substitute, and for that reason are not utilized. It does not do to say that the record is devoid of any substantial showing of dissatisfaction by the shippers with existing service because the complaints are not substantiated by reference to specific instances, or to hold that the shippers failed to show that

they had been unable to obtain reasonably adequate service upon request because existing common carriers, other than Jones, had been almost completely untried in recent years. The record clearly reveals that the shippers, particularly Steele Canning Company, are reasonably familiar with the services, including less-than-truckload rates, of the protestant shippers, and have not used them for the traffic in question because these services are inadequate.

Further, the "adequacy of existing service" test as applied by the Commission in this case in its determination of the effect upon supporting shippers of a denial of the permit is a test proscribed by the legislative history of the Interstate Commerce Act. In 1957 the Commission proposed to Congress several changes in the Act to enable it to better regulate contract carriers. As proposed, § 203(a)(15) of the Act [49 U.S.C. § 303(a)(15)] would have defined the term contract carrier by motor vehicle as meaning:

> * * * any person which engaged in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation * * * under continuing contracts with one person or a limited number of persons for the furnishing of transportation services of a special and individual nature required by the customer and not provided by common carriers.

Section 209(b) [49 U.S.C. § 309(b)] would have been changed to insert the requirement "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown". The amendment of the Interstate Commerce Act does not contain such language, however, and as amended by Public Law 85-163, 71 Stat. 411, the two sections read as previously quoted in this opinion.

Our study of the legislative history of this Act convinces us that the deletion of the willingness and

ability test was at the specific protest of the contract carriers, some of their supporting shippers, the Department of Commerce and the Department of Justice. In its place were substituted the five specifications of items to be considered by the Commission in determining whether the requested permit would be consistent with the public interest and the national transportation policy, and to this change the Interstate Commerce Commission expressed its approval. S. Rep. No. 703, 85th Cong., 1st Sess. (1957) (Report of Senate Committee on bill which became Public Law 85-163, 71 Stat. 411). See, *J-T Transport Co., Inc., Extension—Columbus, Ohio,* 79 M.C.C. 695, 711 (Concurring opinion, Walrath, Commissioner) (1959).

We do not believe that there is any difference between the "willingness and ability" test deleted by Congress from the bill proposed by the Commission and the "adequacy of service" test which the Commission said it applied in this case—a separate test, it maintains, from the one deleted. We believe that the Commission's own opinion in this case shows that it did apply the "willingness and ability" test:

> Applicant argues in his reply [referring to the 1957 amendments] that the willingness and ability of common carriers to provide needed service should be given but little weight in determining whether an application for contract-carrier authority should be granted. Similar contentions were considered by the entire Commission in No. MC-11185 (Sub-No. 100) *J-T Transport, Inc., Extension—Columbus, Ohio, M.C.C.,* decided June 15, 1959; these issues were there resolved in a manner contrary to that urged by applicant; and it was found that the availability of common carrier service is a relevant matter which must be considered in disposing of contract carrier applications.

The decision of the Commission in the *J–T Transport, Inc.* case was attacked in a proceeding instituted by that applicant in the district court for the Western District of Missouri, Western Division, in the case of *J–T Transport Co., Inc.*, v. *United States of America and Interstate Commerce Commission.* The three-judge court in that case handed down its opinion August 9, 1960, 185 Fed. Supp. 838, setting aside the order of the Commission for wrongfully applying the new criteria prescribed by the 1957 amendment to the Interstate Commerce Act. This case was one of first impression in construing the new status of an applicant for a permit as contract carrier when opposed by common carriers on the ground that adequate service was already available by common carrier. In that case, the court discussed exhaustively the legislative history of the 1957 amendments and concludes at page 848 of Fed. Supp.:

> The Commission bases its decision here on the presumption that if an existing common carrier is able and willing to perform services for the shipper or, stated alternatively, that existing service is adequate, the effect on existing protesting common carrier services is adverse. * * * The effect of this is to inject precisely the standard which was deleted by Congress at the time of enactment of the new section.

In this case, the only evidence of the adequacy of existing service to meet the transportation requirements of the supporting shippers came from the testimony of common carriers that they were willing and able to serve, though they had not been called upon by the shippers to do so in recent years as to the traffic in question; all the other testimony was to the effect that the existing service was considered inadequate by the shippers.

We do not believe that it was the intent of Congress that the approval or disapproval of an application for a contract carrier permit should be determined solely by reference to whether or not the proposed service is provided by common carriers, or one which they are unwilling or unable to provide. Sufficient tests and safeguards to control the granting of contract carrier permits are contained in the law to protect common carriers without the imposition by the Commission of a test which Congress deemed improper.

As the Court said in overruling the Commission in the *J-T Transport* case:

> Thus, in weighing these various factors, one against the other, we reach the conclusion that even though the Commission may find that issuance of a permit will in fact adversely affect a protesting carrier, that in and of itself does not necessarily justify a denial of the permit. The statute does not say, "The permit shall be issued, unless an existing carrier will be adversely affected." It does set out clearly and concisely the standards by which the Commission must be guided, and there is no longer a need to resort to special tests beyond the language of the statute, which may have been necessary in making determinations prior to the amendments. The five criteria in Section 209 (b) are broad and inclusive, and when given proper application, in light of the evidence, the Commission should, without the injection of other factors, be able to make a proper disposition of the application.

III

Neither do we believe that lower costs in the form of rates may be ignored in determining the effect denying the permit would have upon the shippers. Congress has declared one of the goals of our national

transportation policy is to promote "economical" service.

We are not to be understood as saying that evidence of lower rates is always important, or determinative, when weighing evidence in support of a contract carriage application against that presented by protestant common carriers. Our holding is that where the lower rates result from economies and advantages inherent in contract carrier operation, as they do in this instance, and there is a showing that efficient business operation requires the proposed tailored service—including the lower rates, as is reflected by the record in this instance, the Commission may not disregard this evidence in its evaluation of the effect of a denial of the permit upon the applicant's supporting shippers. Mere cost-cutting or profit-shaving need not be considered perhaps, but evidence of efficient operation must be heeded.

IV

In considering the effect which granting of the permit would have upon the services of the protesting carriers, the Commission concluded, as heretofore stated, that the authorization of a new carrier to transport traffic which common carrier protestants could efficiently handle would have an adverse effect upon the service of such common carriers.

Whatever the validity of this presumption generally, it is overcome in this case by the evidence in the record, which establishes, we think, not only that the protestant common carriers have not handled this traffic but would not handle it if the permit were denied.

Even if it is assumed that some adverse effect would result from the granting of this permit, no consideration was given to the special services which could not

be supplied by a common carrier. As the Court said in the *J–T Transport* case:

> * * * a finding by the Commission that existing common carrier service is "adequate to meet the reasonable transportation needs" of the shipper fails to take into account that the new test under Section 203(a)(15) is whether the service is "designed to meet the distinct *need* of each individual customer." While existing *specialized services* of common carriers may very well be adequate to supply the shipper's *"reasonable transportation needs,"* that existing service may not in fact meet the *distinct* or *specific* need of the supporting shipper.

V

The orders of the Interstate Commerce Commission dated June 30, 1959 and December 16, 1959 in proceeding number MC–117391 shall be set aside and their enforcement enjoined. The cause is remanded to the Interstate Commerce Commission for such further proceedings in conformity with this opinion as may be proper.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT WESTERN DISTRICT OF ARKANSAS FORT SMITH DIVISION

Civil Action No. 1531

ELVIN L. REDDISH, PLAINTIFF

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

CONTRACT CARRIER CONFERENCE OF AMERICAN TRUCKING ASSOCIATION, INC., INTERVENING PLAINTIFF

L. A. TUCKER TRUCK LINES, INC., ORSCHELN BROS. TRUCK LINES, INC., ARKANSAS-BEST FREIGHT SYSTEM, INC., EAST TEXAS MOTOR FREIGHT LINES, INC., GILLETTE MOTOR TRANSPORT, INC., WESTERN TRUCK LINES, LTD., REGULAR COMMON CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC., ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, AND 31 OTHER CLASS I RAIL CARRIERS IN WESTERN TRUNK LINE TERRITORY, INTERVENING DEFENDANTS

BEFORE MATTHES, Circuit Judge, and MILLER and YOUNG, District Judges.

This opinion prepared by Judge Young and this day filed is hereby approved and adopted as the opinion of the Court and pursuant thereto

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the orders of the Interstate Commerce Commission involved here be and are set aside as being unlawful

and void, and the case is remanded to the Commission for further proceedings consistent with the views and rulings expressed in said opinion.

This October 19, 1960.

[s] M. C. MATTHES,
Circuit Judge.

[s] JNO. E. MILLER,
District Judge.

[s] GORDON E. YOUNG,
District Judge.

APPENDIX C

INTERSTATE COMMERCE COMMISSION

No. MC-117391

E. L. REDDISH CONTRACT CARRIER APPLICATION

Decided June 30, 1959

Operation by applicant as a contract carrier by motor vehicle, over irregular routes, of specified commodities, (1) from Springdale, Lowell, and Fort Smith, Ark., and Westville, Okla., to points in 33 States, and (2) from points in 30 States to Springdale, Lowell, Fort Smith, and Westville, found not shown to be consistent with the public interest and the national transportation policy. Application denied.

John H. Joyce and *A. Alvis Layne*, for applicant.

John C. Ashton, Edward G. Bazelon, Carll V. Kretsinger, J. Max Harding, Hugh T. Matthews, E. L. Ryan, Jr., J. W. Durden, Roy L. Eyster, Jerry Prestridge, Marion F. Jones, Gerald A. Orscheln, Vernon M. Masters, Thomas D. Boone, G. F. Gunn, Jr., and *Chester G. Hayes, Jr.*, for protestants.

REPORT OF THE COMMISSION

DIVISION 1, COMMISSIONERS MURPHY, GOFF, AND WEBB

BY DIVISION 1:

Joint and separate exceptions were filed by certain protestants to the order recommended by the examiner, and applicant replied. Our conclusions differ from those recommended.

By application filed May 13, 1958, as amended, E. L. Reddish, of Springdale, Ark., seeks a permit author-

izing operation, in interstate or foreign commerce, as a contract carrier by motor vehicle, over irregular routes, (1) of canned goods, from Springdale, Lowell, and Fort Smith, Ark., and Westville, Okla., to points in Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Illinois (not including Chicago), Indiana, Iowa, Kansas (not including Wichita), Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri (not including St. Louis, Kansas City, Springfield, and Joplin), Maryland, Nebraska, New Jersey, New Mexico, North Carolina, South Carolina, North Dakota, South Dakota, Ohio, Oklahoma (not including Oklahoma City and Tulsa), Pennsylvania, Tennessee (not including Memphis), Texas (not including Dallas and Fort Worth), Virginia, West Virginia, and Wisconsin, and (2) of canned goods and materials and supplies used in the manufacture of canned goods, from points in Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Illinois (not including Chicago for articles other than metal cans and lids), Indiana, Iowa, Kansas (not including Wichita), Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri (not including St. Louis, Kansas City, Springfield, and Joplin), Maryland, Nebraska, New Jersey, New Mexico, North Carolina, South Carolina, North Dakota, South Dakota, Ohio, Oklahoma (not including Oklahoma City and Tulsa), Pennsylvania, Tennessee (not including Memphis for articles other than boxes), and Texas (not including Dallas and Fort Worth), to Springdale, Lowell, and Fort Smith, Ark., and Westville, Okla. The proposed service would be limited to a transportation service to be performed under a continuing contract or contracts with Steele Canning Company, of Springdale, Keystone Packing Company, of Fort Smith, and Cain Canning Com-

pany, Inc., of Springdale, hereinafter called Steele, Keystone, and Cain, respectively.

The Southwest Railroad Association, class I rail carriers in western trunkline territory, and numerous motor carriers[1] oppose the application.

The examiner recommended that the application be granted. On exceptions protestants assert that the examiner erred in concluding that a grant of the proposed authority would have no material adverse effect upon existing carriers and would be consistent with the public interest and the national transportation policy. Specifically, it is argued that, apart from evidence pertaining to rates, there is absolutely no evidence that protestants cannot satisfactorily perform the proposed service and that shippers' admitted dissatisfaction with protestants motor carriers' existing rate structure on less-than-truckload shipments does not constitute a statutory basis for the issuance of a permit. In reply applicant says that the conclusions and findings of the examiner are amply supported by the record. He urges that a grant will have no adverse effect on protestants, whereas a denial will disastrously affect shippers; that pro-

[1] Frisco Transportation Company; Watson Brothers Transportation Company; Central Wisconsin Motor Transportation Company; The Chief Freight Lines Company; Campbell Sixty-Six Express, Inc.; Churchill Truck Lines, Inc.; Howard and James Nelson, doing business as Nelson Bros.; East Texas Motor Freight Lines, Inc.; Herrin Transportation Company; Western Trunk Lines, Limited; Gillette Motor Transport; Arkansas-Best Freight System, Inc.; Bo-Mac Transportation Company; Red Cargo Freight Lines, Inc.; Merchants' Fast Motor Lines, Inc.; Wright Motor Lines; Loring Truck Lines; Buckingham Transportation, Inc.; Buckingham Express; Buckingham Transfer; Orscheln Bros. Truck Lines, Inc.; Southwest Freight Lines, Inc.; Freightways, Inc.; Missouri Arkansas Transport Company; and L. A. Tucker Truck Lines.

testants' service is irregularly conducted and prohibitively priced; that protestants cannot provide the necessary multiple pickups and multiple deliveries; and that a denial of the application will force shippers to expand private-carriage operations. Applicant contends that the 1957 amendments to the contract-carrier provisions of the Interstate Commerce Act, coupled with the Supreme Court's decision in *Schaffer Transp. Co.* v. *United States*, 355 U.S. 83, in effect set contract carriage apart from common carriage as a "separate mode of transportation," and that in determining an application for contract-carrier authority we must consider whatever distinct advantages contract-carrier service may have over common-carrier service, including the possible ability of a contract carrier to offer service at a lower rate. He further argues that in determining contract-carrier applications this Commission is limited in the issues which may be considered to those specifically set out in section 209(b) of the act; and that, in light of these criteria, he has demonstrated that a grant of authority would be consistent with the public interest and the national transportation policy.

The evidence adduced, the examiner's recommendation, the exceptions, and the reply have been considered. The examiner's statement of facts is correct in all material respects, and we adopt it as our own. The facts are repeated only insofar as is necessary for discussion of the issues.

Applicant holds no permanent motor-carrier authority. On June 12, 1958, he had nine tractor-trailer units under long-term lease to Steele. Because of a strike of Steele's drivers, applicant obtained temporary authority to transport, under contract with Steele, certain of the involved commodities from and to numerous points which he here proposes to serve. The temporary authority is conditioned to

expire upon final determination of this proceeding. Practically all of the outbound shipments were comprised of less-than-truckload shipments for delivery at several points en route, including points in different States. For these small shipments, applicant assessed a rate computed on the basis of his truckload rate, with no extra charge for stopping in transit.

Steele operates a plant at Lowell and a warehouse at Springdale. In addition to manufacturing and shipping between 500,000 and 600,000 cases of canned fruits and vegetables annually, Steele, prior to the strike purchased and distributed approximately 85 percent of Cain's production, or between 500,000 and 600,000 cases annually, and 75 percent of Keystone's production, or between 400,000 and 500,000 cases. The strike has caused Steele to curtail these purchases by about 10 percent. In addition, Steele makes substantial purchases from canners at Westville and Springdale. Steele takes title to the commodities at the plants of the suppliers and selects the carrier for the intial movement to the customers and to its warehouse in Springdale. Steele ships a substantial volume of canned goods in straight truckload lots to the points in the States here involved; however, the majority of its outbound shipments, and this portion of its outbound traffic is increasing, are combined loads comprised of small volume orders of several customers requiring expeditious service. Often these loads are composed of shipments picked up at more than one of the plants of its suppliers. A movement normally requires up to six or more stops en route for delivery to consignees in two or more States. The shipper has customers at various points in the destination States and is continually expanding its sales area. Its customers maintain a low inventory, thus requiring shipper to make deliveries on short notice. In addition to controlling

outbound movements, Steele obtains title to all inbound materials and supplies at the source of supply and selects the carrier for the inbound movements. It purchases necessary items used in the manufacture of canned goods at many points in the territory here involved.

Since 1948 Steele has conducted private motor-carrier operations, and about 80 percent of its traffic has moved in this way or, since its labor difficulties began, by applicant under temporary authority. Most of its remaining traffic has been transported by motor common carriers, with most of the shipments being originated by Jones Truck Line, Inc., which does not oppose the application. Rail service has also been used to a limited extent. The motor common carriers provide service to authorized destination points and select the connecting carriers for joint-line movements to points beyond their authorized territory. Although it desires a single-line service to all points, Steele will continue to use the joint-line service of existing common carriers on truckload movements. It asserts that on less-than-truckload shipments existing carriers are unable to provide multiple pickup and multiple delivery service, and that their service is not expeditious. However, its support of the application is primarily predicated on its opinion that existing rates on less-than-truckload shipments are prohibitive. Because of the competitive situation, and the small profit derived from the sale of a shipment of canned goods, Steele's representative expressed the opinion that it would be forced out of business if it had to ship the numerous small orders of canned goods, in less-than-truckload quantities, at less-than-truckload, common-carrier rates, and that successful operations of its business necessitates the movement of this traffic in consolidated loads, either by private carriage or by for-hire motor carriers at truckload rates. Steele de-

sires to terminate its private operations because of labor difficulties and to utilize applicant instead. It will enter into appropriate contracts if authority is granted. If the application is denied, the shippers will continue to use private carriage without resorting to further common-carrier service because such carriers' less-than-truckload rates are considered prohibitive.

Cain is willing to provide the volume of canned goods which will be required by Steele in the future; however, it is desirous of selling and shipping a substantial portion of its production to prospective customers at various points in the States here involved so as not to be dependent on one or more large customers for the sale of its products. Prior to the strike, it never sold directly to customers, the supplies not used by Steele having been sold to other canning companies in Arkansas and Oklahoma. These companies picked up the freight at Cain's plant. Since the strike, it has had several direct sales to customers at Kansas City, St. Louis, and Chicago, which were satisfactorily handled by Jones Truck Line, Inc. All inbound supplies are either furnished by Steele or by brokers who control the traffic. Cain fears that it will not be able to expand its sales area if it is forced to ship at less-than-truckload rates and that existing motor carriers will be unable to handle small shipments in combined loads. Admittedly, this shipper is not very familiar with the service provided by the existing motor carriers and supports applicant on inbound shipments so as to insure him a balanced operation and enable him to render a better service on outbound movements.

Keystone has an operation similar to that of Cain. However, that portion of its production which is not purchased by Steele is sold by the shipper and delivered by rail and motor carriers to customers at sev-

eral points in the territory here involved. Existing service on truckload traffic is satisfactory, but the shipper is convinced that it would be unable to ship less-than-truckload traffic because of transportation costs. However, if the proposed service were authorized it would make an effort to obtain sales and ship the freight in loads requiring delivery at two or more points en route and at truckload rates for each shipment. The shipper has begun to operate two trucks in private carriage and will supplement its fleet if the application is denied and its small orders increase.

A number of motor-carrier protestants presented evidence of their authorities and operations. These are discussed in detail in the examiner's report and need not be repeated here. By either direct- or joint-line service motor protestants can provide service to substantially all the points involved herein. Each of the opposing motor carriers, except Nelson Brothers, is a common carrier, and each operates a substantial amount of equipment suitable for the transportation of the commodities here involved. Although shippers have knowledge of the availability of service from several protestants, none of the protestants have participated in the involved traffic. All have expressed an interest in participating in this traffic either as initial or connecting carriers on both inbound and outbound shipments. They have handled both large and small shipments of the type of traffic here involved and are willing to provide multiple pickup and delivery where authorized. They believe that until their service is tried and found wanting there is no justification for a grant of additional authority.

The Western Pacific Railroad Company, The Denver and Rio Grande Western Railroad Company, the Great Northern Railroad Company, and The Atchison, Topeka and Santa Fe Railway Company, in con-

nection with other rail carriers, operate extensively throughout the territory. Canned goods constitute a substantial part of their traffic, and they have been experiencing a sharp decline in canned goods tonnage. To a limited extent they have participated in outbound movements of the supporting shippers' traffic, and to a greater extent they have handled inbound shipments of materials and supplies. They contend that they are able to provide needed service and that the shippers have failed to take full advantage of their facilities. They are particularly anxious to retain inbound traffic moving from many points in the territory applicant wishes to serve to the shippers' plants.

Applicant argues in his reply to exceptions that the 1957 amendments to certain sections of the act affecting contract carriage and the decision in *Schaffer Transp. Co.* v. *United States, supra*, set contract carriage apart from common carriage as a separate mode of transportation, and that the willingness and ability of common carriers to provide needed service should be given but little weight in determining whether an application for contract-carrier authority should be granted. Similar contentions were considered by the entire Commission in *J-T Transport Co., Inc., Extension—Columbus, Ohio*, 79 M.C.C. 695, hereinafter referred to as the *J-T Transport* case; these issues were there resolved in a manner contrary to that urged by applicant; and it was found that the availability of common-carrier service is a relevant matter which must be considered in disposing of contract-carrier applications.

Section 209(b) of the act sets forth certain criteria which must be considered, among other things, in determining whether the issuance of a permit will be consistent with the public interest and the national

transportation policy. These are: (1) the number of shippers to be served by applicant, (2) the nature of the service proposed, (3) the effect of a grant of authority upon protesting carriers, (4) the effect of a denial on applicant and his supporting shipper, and (5) the changing character of the shipper's requirements. It should be noted, however, that these are not factors that must be considered exclusively. Other matters affecting the public interest and the national transportation policy, must also be examined. See *J-T Transport* case, *supra.*

The first of the statutory enumerated factors is to be considered in relation to the question whether applicant intends to serve "one or a limited number of shippers," and is thus a bona fide contract carrier as defined in section 203(a)(15) of the act. We think that applicant, who proposes to limit his service to only three shippers, meets this particular requirement.

The next factor, the nature of the proposed service, requires a determination of whether the service proposed and shown to be needed by the supporting shipper is one which might be performed by either a common or contract carrier, or by one such class of carriers only. Shippers require a motor-carrier service for the transportation of less-than-truckload shipments of canned goods, providing multiple pickups and deliveries. Protesting carriers are authorized to serve the origin points involved and, either directly or through interchange, numerous points in the vast 33-State destination territory in which applicant desires to operate. They are willing to make multiple pickups and they offer stopoff in transit delivery service. The service required by the shippers does not seem to be in any way different from that which motor common carriers are rendering daily to countless other shippers of the same or similar commodi-

ties. This appears to be a situation in which the service proposed and shown to be needed could be performed by protesting common carriers as well as by applicant. In fact, shippers assert that they would continue to use common-carrier service on truckload shipments even if the application is granted.

Section 209(b) next requires us to determine the effect upon protesting carriers which a grant of authority to a contract carrier would have. It is clear that authorization of a new carrier to transport traffic which a common-carrier protestant can efficiently handle would have an adverse effect upon the service of that protestant. See *J-T Transport* case, *supra*.

Section 209(b) also requires us to consider the effect of a denial on applicant and its supporting shipper. Applicant is a new entrant into the field of motor transportation, and we think it clear that a denial of this application could not be said to affect him adversely. Whether the shippers would be adversely affected by a denial must depend upon a determination of whether existing service is adequate to meet their transportation requirements. Aside from evidence pertaining to rates, the record is devoid of any substantial showing of dissatisfaction on the part of the shippers with existing service. Complaints about joint-line service, slow transit time, and inability to arrange multiple pickups and deliveries are of a general nature, and are not substantiated by reference to specific instances. Although protestant motor carriers, especially those operating over regular routes, may be hindered in some instances by their authorities and the nature of their operations from achieving complete flexibility in effecting multiple pickups and deliveries, the supporting shippers have failed to show that they have been unable to obtain reasonably adequate service upon request. In fact, the

existing service, except for that of Jones Truck Lines, Inc., has been almost completely untried in recent years. As for inbound shipments, shippers admit that there is no defect in existing service and that they support the application in this respect merely to enable applicant to conduct a balanced operation. In the absence of a more positive showing that existing service will not meet shipper's reasonable transportation needs, we are not warranted in finding that a new service should be authorized or that the supporting shippers will be adversely affected by a denial of this application.

The final matter which section 209(b) directs us to consider in determining a contract-carrier application is the effect which a denial would have upon the changing character of the shipper's requirements. This factor should be applied in two different situations. First, where a contract carrier is presently serving a shipper and the shipper's requirements change because, for example, it develops a new type of product or opens new markets, its need for a complete transportation service should be considered in determining whether an application should be granted. This situation is not present here, since this is applicant's first attempt to obtain permanent operating authority. Second, we must consider whether there is likelihood that the shipper's transportation requirements will change at some future date in such a manner as to make the service proposed by a contract-carrier applicant necessary. In the instant case there is no indication that the nature of the shipper's needs is likely to change so as to render existing common-carrier service unsatisfactory.

There has been no convincing showing by applicant that the supporting shippers have a real need for the proposed contract-carrier service. On the contrary,

the only serious complaint which shippers have against existing service is with the less-than-truckload rates of motor common carriers. Even should the application be granted, they assert, they will continue to use common-carrier service to some extent. It may be fairly concluded, we believe, that their support of this application rests entirely upon a desire to obtain lower rates. This is not a sufficient basis to justify a grant of authority to a new carrier. If the shippers believe that the rates of presently authorized carriers are unjust or unreasonable, they should seek relief in actions against these carriers under appropriate provisions of the act. Under the circumstances, the application will be denied.

We find that applicant has failed to establish that the proposed operation will be consistent with the public interest and the national transportation policy; and that the application should be denied. An order denying the application will be entered.

COMMISSIONER WEBB concurs in the result.

APPENDIX D

STATUTES INVOLVED

Section 203(a)(15) of the Interstate Commerce Act, 49 U.S.C. 303(a)(15), as amended on August 22, 1957, 71 Stat. 411, Public Law 85–163, 85th Cong., S. 1384, provides as follows (deletions by the amendment shown in black brackets, additions made by the amendment in italics):

> The term "contract carrier by motor vehicle" means any person which, [under individual contracts or agreements], engages in [the] transportation *by motor vehicle of passengers or property in interstate or foreign commerce, for compensation* (other than transportation referred to in paragraph (14) and the exception therein), [by motor vehicle of passengers or property in interstate or foreign commerce for compensation] *under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.*

Section 209(b) of that Act, 49 U.S.C. 309(b), as amended on August 22, 1957, 71 Stat. 411–12, Public Law 85–163, 85th Cong., S. 1384, provides as follows (deletions and additions made by the amendment are shown in same manner as shown for Section 203(a)(15)):

> Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain

such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. *In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements.* The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier, *including terms, conditions and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service,* as [are] *may be* necessary to *assure that the business is that of a contract carrier and within the scope of the permit, and* to carry out with respect to the [operations]

operation of such carrier the requirements established by the Commission under section 204(a) (2) and (6): *Provided,* [however,] *That within the scope of the permit and any terms, conditions or limitations attached thereto, the carrier shall have the right to substitute or add to its equipment and facilities as the development of its business may require: Provided further,* That no terms conditions or limitations shall *be imposed in any permit issued on or before the effective date of this proviso which shall* restrict the right of the carrier to substitute [or add] *similar* contracts within the scope of [the] *such* permit; *or to add contracts within the scope of such permit unless upon investigation on its own motion or petition of an interested carrier the Commission shall find that the scope of the additional operations of the carrier is not confined to those of a contract carrier as defined in section 203(a)(15), as in force on and after the effective date of this proviso.* [or to add to his or her equipment and facilities, within the scope of the permit, as the development of the business and the demands of the public may require.]

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